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No. 79-580

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE COUNTY OF NASSAU,

Petitioner,

—*v.*—

DEWITT OWENS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Petitioner County of Nassau presents this case as an unfortunate but isolated act of brutality. What plaintiff Dewitt Owens alleged, however, was a premeditated and systematic beating in the supposedly controlled environment of the Nassau County Jail by 7 officers and supervisors, including the lieutenant and sergeant in charge of the platoon of correctional officers (6a; A3, 21-30, 49).[1] It is undisputed that plaintiff never struck any correctional officer, yet the beating continued, with racial epithets, even after plaintiff—bones broken and head lacerated—later had been dragged unconscious to an office downstairs (*id.*; A100-01). All of this occurred because plaintiff refused to sign a document which he knew he did not have to sign (5a).

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[1] "A—" references are to the record before the court of appeals; "—a" references are to the appendix attached to petitioner's brief.

The extraordinary lawlessness of this institution—where the entire platoon of correctional officers assembled, marched up to locked cell, unlocked the door and then pummelled a prisoner—occurred despite the special obligation Nassau County had undertaken to protect this particular prisoner. The County had contracted with the federal government to safekeep plaintiff, a cooperating federal prisoner, and had promised, *inter alia,* that he would "not be subject to corporal punishment or other cruel or inhumane treatment" (4a-5a; A153).

The district court dismissed the complaint on the ground that plaintiff—who had been allowed no discovery—had not pointed to any official policy of the County to brutalize prisoners, but had alleged only the facts which he knew (25a-26a; see 23a).

The court of appeals reversed, principally on the ground that a municipality can be liable for a deprivation of civil rights where it is culpable under traditional tort principles, specifically where its conduct is "so severe as to reach the level of 'gross negligence' or 'deliberate indifference' to the deprivation of plaintiff's constitutional rights" (8a).

ARGUMENT

I.

The decision below is not ripe for review.

The decision of the court of appeals requires only that plaintiff be allowed discovery and have an opportunity to prove his case. Until such time as the facts are fully developed, and any award against the County is actually sustained by the court of appeals, the County's disagreement with the court of appeals' formulation is not ripe for review.

II.

The court of appeals applied traditional principles and defined the scope of municipal liability precisely as was done at common law and in analogous actions under the civil rights laws.

The County of Nassau persists, as in the court below, in asserting that plaintiff seeks to hold it liable "solely . . . on a respondeat superior theory" (Pet. 9-12), a theory precluded by *Monell* v. *New York City Dep't of Social Services,* 436 U.S. 658, 691 (1978) and, earlier, by the Second Circuit. *E.g., Turpin* v. *Mailet,* 579 F.2d 152, 160-67 (2d Cir. 1978) (*en banc*). The cases petitioner cites as conflicting with the decision below all involve such claims (Pet. 13-15).

Plaintiff, however, seeks to hold the County of Nassau liable not under a *respondeat superior* theory, but under traditional tort principles for its own culpability, *i.e.,* "for the natural consequences of [its] actions," *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961); *see Monell,* 436 U.S. at 700-01; *Turpin* v. *Mailet,* 579 F.2d at 165-67. Under common law, a municipality found to be grossly negligent or deliberately indifferent to prisoners' welfare is liable for their mistreatment. *Fernelius* v. *Pierce,* 138 P.2d 12, 14-17 (Cal. Sup. Ct. 1943); *Meistinsky* v. *City of New York,* 309 N.Y. 998 (1956). Supervisory officials have been held liable under § 1983 in the same circumstances, *see Turpin* v. *Mailet,* 579 F.2d at 167; *Wright* v. *McMann,* 460 F.2d 126, 134-35 (2d Cir.), *cert. denied,* 409 U.S. 885 (1972); *Carter* v. *Carlson,* 447 F.2d 358, 365 (D.C. Cir. 1971), *rev'd on other grounds,* 409 U.S. 418 (1973); *Whirl* v. *Kern,* 407 F.2d 781, 787-89 (5th Cir. 1968), *cert. denied,* 396 U.S. 901 (1969). *See also Byrd* v. *Briske,* 466 F.2d 206, 210 (7th Cir. 1972).

Monell did not cast doubt upon the wisdom of this established body of law, but reaffirmed it by carefully excluding only those claims brought "*solely* . . . on a respondeat superior theory." 436 U.S. at 691 (emphasis in original). *Monell's* references to "policy" and "custom," 436 U.S. at 691, are nowhere defined only as legislative acts or pronouncements, and could not be so limited without rendering meaningless *Monell's* fundamental holding that municipalities may be liable where they are responsible for the deprivation of civil rights. Local officials will rarely be so stupid as to express publicly any *de facto* policy of, or deliberate indifference to, discrimination or deprivation of civil rights. *See id.* at 694 n.58.

Further, there is a special need for such causes of action in the controlled environment of correctional institutions. In a prison—unlike normal police activity—there is a unique ability to control and isolate any potential problems without need to resort to the type of violence present here, and there is also a unique ability for the institution—its activities confined within four walls—to exercise control over its employees. A correctional institution also differs from the street situation in its isolation from the scrutiny and criticism of society. In this peculiar environment, the County is in complete control and free from ordinary social oversight. If it hires supervisors and officers with violent tendencies, or does not have sufficient training or controls even to prevent mass premeditated beatings at the hands of its chosen employees, it should be liable for deprivation of plaintiff's civil rights as surely as are its seven officers and supervisors who ganged together to beat plaintiff to unconsciousness.

In allowing plaintiff an opportunity to have discovery and to prove its case, the court of appeals did no more nor less than faithfully apply *Monell* to the particular facts of this case.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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